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No. 82-313

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN E. PAVONE, SR., ET AL., PETITIONERS

v.

LOUIS O. GIUFFRIDA, DIRECTOR,
FEDERAL EMERGENCY MANAGEMENT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend (Pet. 5-7) that the government should be equitably estopped from invoking as a defense their failure to comply with a condition precedent to payment under a flood insurance contract.

1. Petitioner Pavone, Inc., purchased a Standard Flood Insurance Policy (SFIP) on petitioners' building in Stratford, Connecticut. The policy was issued pursuant to the National Flood Insurance Program, which is administered by the Federal Emergency Management Agency (FEMA) (Pet. App. 4a). FEMA regulations provide that the SFIP must be used in the program and that "no provision of the said document shall be altered, varied, or waived other than through the issuance of an appropriate amendatory endorsement, approved by the Administrator as to form and substance for uniform use" (*id.* at 7a; 44 C.F.R.

61.13(d)). In addition, the policy itself provides that no action may be brought thereon for recovery of a claim "unless all the requirements of [the] policy have been complied with," including the submission of a proof of loss within 60 days (Pet. App. 5a). Petitioners allege that the insured property sustained compensable flood damage on January 21, 1979 (*id.* at 4a). It is undisputed, however, that petitioners did not submit a proof of loss within 60 days thereafter (*id.* at 6a).

After a period of adjustment, which included payment for damage to the contents of the building, petitioners brought suit in the United States District Court for the District of Connecticut seeking recovery for alleged damage to the structure of the building. The district court granted the government's motion for summary judgment on the ground that no timely proof of loss had been filed (Pet. App. 4a-7a). The court first rejected petitioners' contention that the "notice of loss" that they had submitted satisfied the contractual requirement of submitting a timely proof of loss, a contention that has been abandoned in this Court (*id.* at 6a). The court also held that actions taken by FEMA during the adjustment period did not waive the proof of loss requirement, explaining that FEMA regulations and the insurance contract preclude all but written waivers (*id.* at 6a-7a).

The court of appeals affirmed in an unpublished opinion for the reasons stated by the district court (Pet. App. 1a-2a). The court specifically noted that it was "mindful of the fact that [petitioners] were represented by counsel at all times during the negotiation of their claims" (*id.* at 2a).

2. Petitioners' contention that FEMA should be estopped from invoking as a defense their failure to comply with the proof of loss requirement is plainly without merit. It is well established that, at least in the absence of affirmative

misconduct (see *INS* v. *Hibi*, 414 U.S. 5, 8 (1973)), the doctrine of equitable estoppel cannot be applied against the government to prevent it from raising as a defense controlling statutes and regulations. See, e.g., *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947). This rule applies even where the plaintiff might otherwise have a valid claim but has failed to comply with procedural requirements in a timely fashion. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Because petitioners allege no affirmative misconduct on the part of the government here, there is no conceivable basis for finding estoppel.

Petitioners urge, however, that review is necessary here to resolve a conflict with *Meister Brothers* v. *Macy*, 674 F.2d 1174 (7th Cir. 1982) (reproduced at Pet. App. 10a-15a). At the outset, we note that no conflict requiring resolution by this Court could conceivably exist because of the explicit lack of precedential value of the decisions involved. The decision below is an unpublished order that, under the rules of the Second Circuit, may not be "reported, cited or otherwise used" in any unrelated case (Pet. App. 1a). *Meister Brothers* was expressly limited to the "unique circumstances of [that] case" and the court explicitly stated that it did not "intend to intimate in any way an appropriate standard for resolution of future cases" (Pet. App. 14a; 674 F.2d at 1177).

In any event, we believe it is clear that *Meister Brothers* was wrongly decided, and there is little reason to expect that it will be followed in the future. Other courts have recognized that the failure to file a timely proof of loss bars a subsequent suit upon an SFIP. See, e.g., *Harper* v. *National Flood Insurers Association*, 516 F. Supp. 725 (M.D. Pa. 1981); *Cross Queen, Inc.* v. *Director, FEMA*, 516 F. Supp. 806 (D. V.I. 1980); *Continental Imports, Inc.* v. *Macy*, 510 F. Supp. 64 (E.D. Pa. 1981). Moreover, the Seventh Circuit recently set forth some general principles

concerning a claim of estoppel against the government that suggest that estoppel should not have been found in *Meister Brothers*. In *Pratte* v. *NLRB*, 683 F.2d 1038 (1982), the court explained that in order to support an estoppel claim the plaintiff must show affirmative misconduct and meet the following conditions:

> First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury.

Id. at 1041, quoting *TRW, Inc.* v. *FTC*, 647 F.2d 942, 950-951 (9th Cir. 1981). Petitioners' claim does not satisfy this test.

Indeed, because they do not allege detrimental reliance, petitioners' claim is not really one of estoppel. Rather, as the district court correctly perceived (Pet. App. 6a-7a), their contention is actually that FEMA *waived* the proof of loss requirement when it continued to adjust the claim even after the 60-day period had passed. But this contention ignores the fact that both the regulations (44 C.F.R. 61.13(d)) and the contract itself expressly provide that the provisions of the policy can be waived only in writing (Pet. App. 7a). The fact that FEMA continued to discuss settlement of the claim after the 60-day period had run does not constitute an implicit abandonment of a defense based on petitioners' failure to satisfy the proof of loss requirement, which is required by the regulations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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